Office-Supreme Court, U.S.
FILED
APR 15 1983
ALEXANDER L. STEVAS,
CLERK

82-1700

In the Supreme Court of the United States

OCTOBER TERM 1982

Ann Cash, T. Smith, C.S. Robinson,
Wilson Webber, Charles Watson, G. Johnson,
and David P. Henry ..... *Petitioners*

V. No. ____

City of Little Rock, Arkansas ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

ALLAN GATES
MITCHELL, WILLIAMS, SELIG,
JACKSON & TUCKER
1000 Savers Federal Building
Little Rock, Arkansas 72201
(501) 376-3151

Attorneys for Petitioners

QUESTION PRESENTED FOR REVIEW

Whether the Arkansas Supreme Court's *sua sponte* denial of attorney's fees for supposed conflict of interest in a taxpayers' action violates the requirements of due process.

PARTIES

The parties to the proceedings in the Arkansas Supreme Court were respondent the City of Little Rock, Arkansas, as appellant/cross-appellee, and the six taxpayer petitioners, Ann Cash, T. Smith, C.S. Robinson, Wilson Webber, Charles Watson, and G. Johnson, as appellees/cross-appellants. Petitioner David P. Henry was not a formal party to the proceedings below, but was counsel of record for the taxpayer petitioners.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the

Supreme Court of the United States

OCTOBER TERM 1982

Ann Cash, T. Smith, C.S. Robinson,
Wilson Webber, Charles Watson, G. Johnson,
and David P. Henry ..... *Petitioners*

V. No. ___

City of Little Rock, Arkansas ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

OPINIONS BELOW

The opinion of the Arkansas Supreme Court is published at 277 Ark. 494, 644 S.W.2d 229, and is reproduced as Appendix A of this petition. The order of the Arkansas Supreme Court denying petitioners' petition for rehearing and the dissent from denial of rehearing are published at 277 Ark. 494, ___, 644 S.W.2d 229, 239 (1983), and are reproduced as Appendix B of this petition. The pertinent orders and opinions of the state trial court are unpublished and are reproduced as Appendix C, Appendix D, and Appendix E of this petition.

JURISDICTION

The decision of the Arkansas Supreme Court in this action was delivered on December 6, 1982. Petitioners filed a timely petition for rehearing to the Arkansas Supreme

Court on December 21, 1982. The Arkansas Supreme Court denied the petition for rehearing on January 17, 1983. This Court has jurisdiction under 28 U.S.C. §1257 (3) to review the questions presented in this petition.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution, Amendment 14, Section 1, Due Process Clause:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law [.]"

STATEMENT OF THE CASE

This petition arises out of a taxpayers' action in state court which challenged a Little Rock, Arkansas municipal privilege tax. The state trial court invalidated the municipal tax at issue and awarded an attorney's fee of $316,190. The Arkansas Supreme Court agreed that the tax was invalid, but vacated the award of attorney's fees on the ground that the taxpayers' attorney had a conflict of interest. This petition presents the due process questions raised by the Arkansas Supreme Court's decision to vacate the attorney's fee award.

In 1969 the City of Little Rock, Arkansas imposed a privilege tax against the local municipal water works. The ordinance imposing the tax specifically authorized the water works to pass the tax on to residential water customers by adding a charge of $ .25 per month to each customer's water bill. Pursuant to the ordinance, the water works started collecting a monthly charge from each residential water customer in 1969 and forwarding the proceeds to the city on a monthly basis. The tax has been continued to the present day in a series of essentially identical ordinances enacted each year since 1969.

In 1981 six residents of Little Rock brought a taxpayers' suit in state court against the City. The suit alleged that the privilege tax was an illegal exaction prohibited by Article 16, Section 13 of the Arkansas Constitution. [1] Pursuant to the Arkansas Tax Procedures Act, the taxpayers asked the trial court to order a refund of

---

1 Article 16, Section 13 of the Arkansas Constitution provides as follows:

> "Any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exaction whatever."

all sums illegally exacted, to apportion a reasonable part of the recovery as their attorney's fees, and to distribute the balance of the refund to the members of the class represented. [2]

Prior to trial the City moved to disqualify the taxpayers' attorney, petitioner David Henry, on conflict of interest grounds. The trial court denied the motion to disqualify. The text of the trial court's order denying the motion to disqualify is reproduced as Appendix C of this petition. After a trial on the merits the trial court declared the tax unlawful, awarded a refund of $1,246,761.30, and apportioned 25% of the refund, some $316,190.00, as the part of the refund to be paid to petitioner Henry as attorney's fees. The text of the trial court's order declaring the tax invalid is reproduced as Appendix D of this petition. The text of the trial court's decree, which awarded the refund and apportioned attorney's fees is reproduced as Appendix E of this petition.

The City appealed the trial court judgment arguing in pertinent part: (1) that the judgment invalidating the tax and awarding a refund and attorney's fees should be reversed because the taxpayers' attorney had a conflict of interest; and (2) that the amount of recovery allocated as attorney's fees was excessive. The Arkansas Supreme

---

2 The pertinent section of the Arkansas Tax Procedures Act provides as follows:

> Award of attorney's fees in tax refund actions authorized. — It is hereby declared to be the public policy of this State that circuit and chancery courts may, in meritorious litigation brought under Article 16, section 13 of the Constitution of the State of Arkansas, in which the court orders any county, city or town to refund or return to taxpayers moneys illegally exacted by the county, city or town, apportion a reasonable part of the recovery to attorneys of record and order the return or refund of the balance to the members of the class represented. Ark. Stat. Ann. §84-4601 (Repl. 1980).

Court unanimously agreed that the tax in question was invalid and affirmed the trial court's refund with modifications in amount. A majority of the Arkansas Supreme Court concluded that the taxpayers' attorney did have a conflict of interest and reversed the entire attorney's fee award. The dissenting justices argued that there was no conflict and, in any event, that denial of attorney's fees was not a fair or appropriate sanction.

The taxpayers petitioned for rehearing in the Arkansas Supreme Court. The petition for rehearing raised for the first time the due process questions asserted in this petition for certiorari. The Arkansas Supreme Court denied the petition for rehearing without explanation.

Raising the federal question for the first time in their petition for rehearing was timely because the Arkansas Supreme Court's decision to vacate the attorney's fee award on conflict of interest grounds was unexpected. No party to the state court proceedings had sought the relief granted by the Supreme Court as a remedy for the alleged conflict. Therefore, petitioners had no reason to anticipate or assert the federal questions. Under such circumstances, the federal question was timely raised. *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 677-678 (1930). And the petition for rehearing, which raised the federal issue for the first time, will support the exercise of this Court's jurisdiction even though the Arkansas Supreme Court denied the petition without expressly stating its views on the federal issues. *Wilson v. Cook*, 327 U.S. 474, 485 (1946); *Cole v. Arkansas*, 333 U.S. 196, 200 (1948); *Great Northern R. Co. v. Sunburst Oil Co.*, 287 U.S. 358, 366-367 (1932).

ARGUMENT

Petitioners recognize that the decision to vacate the attorney's fee award in this action does not present issues of major public importance or urgency typically required to warrant plenary review in this Court. Petitioners also recognize that this Court does not have the time or resources to rectify every injustice that may have occurred in the thousands of cases docketed before it. In this case, however, Petitioners urge the Court to grant the petition because (i) a gross injustice is clear from the record; (ii) unless this Court grants the petition, the injustice that has occurred will pass without any opportunity for review in any forum; and (iii) the injustice evident from the record can be remedied by summary action without significant expenditure of this Court's time.

1. The majority opinion of the Arkansas Supreme Court concluded that there was a disqualifying conflict of interest because the taxpayers' attorney, Petitioner David Henry, represented the City in another lawsuit, *Phillips v. Weeks*, LR-72-C-26 (E.D. Ark.), at the same time that he was pursuing the taxpayers' claim against the City. The pertinent facts regarding this supposed conflict are not in dispute.

In 1972 five black residents of Little Rock filed a class action under 42 U.S.C. §1983 against the Police Chief, the City Manager, the City Board of Directors, the City Civil Service Commission, and several named police officers. *Phillips v. Weeks, supra.* The suit alleged various forms of police harassment and brutality against blacks. The case was tried to the court,[3] sitting without jury, on various days in December 1974 and January-February 1975. At the conclusion of the trial the court announced from the bench

---

3 The Honorable G. Thomas Eisele, Chief Judge of the United States District Court for the Eastern District of Arkansas, presiding.

that it found no pattern or practice of police harrassment or brutality against blacks. The court took the case under advisement on the issue of whether the City had maintained an "S docket," under which blacks allegedly were detained on mere suspicion without any formal charges being filed. In July 1979, four years after taking the case under submission, the court conferred with the parties regarding the then current status of the "S docket" issue and requested briefs on the subject. One year later, on June 30, 1980, the Court ruled in plaintiffs' favor on the "S docket" issue. The court directed the parties to meet, and, if possible, to formulate a consent order on the "S docket" claim. The parties never reached agreement on a consent order. At a chambers conference on August 13, 1981, the parties requested the court to enter a judgment. As of the date of this petition, the matter is still under submission to the court for entry of a judgment.

Petitioner David Henry represented the defendant City Officials in *Phillips v. Weeks* until December 7, 1982, the day after the Arkansas Supreme Court's decision in this case, at which time petitioner Henry was granted leave to withdraw.

In the absence of any other facts, the conduct of petitioner Henry might present a close question of dual representation. Several jurisdictions have held that an attorney should not represent one party, A, in litigation against a second party, B, while at the same time representing B in unrelated litigation against a third party, C. *E.g., Cinema 5 Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976); *Jeffry v. Pounds*, 67 Cal. App. 3rd 6, 136 Cal. Rptr. 373 (1977). Most jurisdictions, however, apply a substantial relationship test to determine whether the dual representation amounts to a disqualifying conflict. *E.g., Redd v. Shell Oil Co.*, 518 F.2d 311 (10th Cir. 1975); *Silver Chrysler Plymouth, Inc. v. Chrysler Motor Corp.*, 518 F. 2d 751 (2d Cir. 1975); *Uniweld Products, Inc. v. Union Carbide Corp.*, 385 F.2d 992 (5th Cir. 1967), *cert. denied*, 390 U.S. 921

(1968). Under the substantial relationship test an attorney should be disqualified:

> "where any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation." *T.C. Theatres Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 268 (S.D.N.Y. 1953).

In this case there was no relationship whatsoever, substantial or otherwise, between the taxpayers' suit against the City and the City officials' defense against the brutality claim. As a technical matter the City was never a formal party to *Phillips v. Weeks*, and the *Weeks* defendants were never parties to the taxpayers' suit. More importantly, the active proceedings in the police brutality suit were concluded well before the taxpayers' suit was ever filed. [4]

The potentially close question of dual representation, however, disappears altogether when one considers the fact that months before the taxpayers' suit was filed petitioner Henry asked the City Attorney to take the *Phillips v. Weeks* file back in order to avoid any conflicts of interest. The City Attorney prevailed upon petitioner Henry to keep the *Phillips v. Weeks* file and expressly stated that it would

---

4

The taxpayers' suit was filed on August 25, 1981. By that date the district court had already ruled on the "S docket" issue, and the parties had requested the Court to proceed with entry of an appropriate judgment. The only events that have occurred in *Phillips v. Weeks* since the commencement of the taxpayers' suit are (1) the withdrawal of petitioner David Henry as counsel of record on December 7, 1982; and (2) a chambers conference on February 8, 1983 to determine whether the passage of time had rendered a judgment on the "S docket" unnecessary and to inquire whether the parties wished the presiding judge to recuse in light of the private lawsuit he had filed against the City of Little Rock. *J. Wythe Walker, G. Thomas Eisele & Martin Eisele v. City of Little Rock, et al.*, No. 82-6505 (Pulaski County, Ark. Cir. Ct., filed September 17, 1982).

never serve as the basis of any motion by the City to disqualify petitioner Henry as counsel. Under these circumstances the City could not in good conscience thereafter assert the "dual representation" as a disqualifying conflict.

The Arkansas Supreme Court majority summarily dismissed the City Attorney's commitment to petitioner Henry as a nullity apparently on the theory that the City Attorney did not have authority to bind the City. This cavalier rejection of the City Attorney's commitment totally ignores the central issue, namely whether it was reasonable for petitioner Henry to rely upon the City Attorney's representation. Certainly to the degree that petitioner Henry acceded to the City Attorney's request and agreed in good faith not to return the *Phillips v. Weeks* file, it would be totally unreasonable and unfair to impose a sanction for any subsequent "dual representation."

Although the precise facts of this case are unusual, they are not without precedent. In *City of Cleveland v. Cleveland Electric Illuminating Company*, 440 F. Supp. 193 (N.D. Ohio), a city sought to disqualify a law firm from representing an electric utility company which the city was suing for alleged antitrust violations. The city based its motion to disqualify on dual representation, because the electric utility company's law firm had represented, and continued to represent, the city in municipal bond and related public finance matters. The district court acknowledged that the dual representation might present a problem in other circumstances, but the court refused to disqualify the firm because the city attorney had expressly committed to the firm that its activity as the city's bond counsel would not be asserted as a conflict with the firm's longstanding role as general counsel to the electric utility:

> The alleged conflict of interest, if any in fact exists, arises as a result of actions induced by the party seeking disqualification. [The law firm]'s asserted

> defense of equitable estoppel is therefore appropriately urged.
>
> * * *
>
> While the doctrine is sparingly invoked against municipal corporations, there is no doubt that a municipality can be estopped to prevent a manifest injustice, where positive action or representation by the municipal corporation, acting within the scope of its authority, has induced another to act in good faith, and it would be inequitable to permit the retraction of such acts. 440 F. Supp. at 203-204.

Similarly, in *Informal Opinion 1323* (April 21, 1975), the ABA Committee on Ethics and Professional Responsibility stated:

> [G]iving credence to the statement by Lawyer X that when he was engaged by counsel for Company B to represent the latter in its dispute with Company C, he was advised by the lawyer for the Company B that there would be no conflict in his continued representation of Company A, then it would be improper for Company B to urge disqualification of Lawyer X now that Company A and Company B have become embroiled in separate litigation. *Id.* at 3.

Petitioners respectfully submit that if there was any disqualifying conflict of interest in petitioner Henry's dual representation, the conflict was one which the respondent City of Little Rock induced by its own conduct. The City should now be estopped from seeking to deprive petitioner Henry of the trial court's fee award when petitioner Henry merely relied in good faith on the City's prior representations.

The propriety of estoppel in this case is especially strong because the City of Little Rock has no financial stake

in the amount of the attorney's fee awarded. Under the provisions of the Arkansas Tax Procedures Act quoted at Footnote 2 above, the City of Little Rock is required to pay only the refund determined to be due. The City will have to pay the full refund regardless of whether any portion of the refund is allocated as attorney's fees. The only people with a real financial stake in the amount of the attorney's fee are the taxpayer petitioners and the class of taxpayers they represent. Although the amount of refund they ultimately receive will be reduced by the allocation of any attorneys' fee award out of the refund total, the taxpayer petitioners firmly support petitioner Henry's efforts to obtain an attorney's fee award. The taxpayer petitioners support such an attorney's fee award out of their total refund because petitioner Henry's diligent efforts were largely responsible for terminating the illegal exaction and obtaining any refund at all. The taxpayer petitioners believe that these efforts should be compensated as provided in the Arkansas Tax Procedures Act.

2. Petitioners recognize that not every injustice constitutes a due process violation; and not every due process violation is of sufficient import to warrant intervention by this Court. In this case, however, the decision of the Arkansas Supreme Court has resulted in an unexpected outcome of great unfairness. Unless this Court grants the petition, the injustice will pass without any opportunity for review in any forum. This Court has intervened on due process grounds in other cases to prevent an injustice of relatively local or minor import where the facts in question simply could not support the sanction imposed. *See, e.g., Thompson v. City of Louisville*, 362 U.S. 199 (1960); *Garner v. Louisiana*, 368 U.S. 157 (1961). Similar intervention is warranted in this case.

The decision of the Arkansas Supreme Court was unexpected and impossible to anticipate. Although the City had sought reversal of the tax refund on conflict of interest grounds, the City did not argue or rely on the *Phillips v. Weeks* dual

representation theory seized upon by the majority. The City also sought reduction of the attorney's fee as excessive under the statute, but the City did not seek denial of attorney's fees altogether. Furthermore, the City did not argue dual representation or any other alleged conflict as grounds for reducing the award. As a consequence, the Arkansas Supreme Court majority's decision imposed a sanction that was never requested, and did so on the basis of a legal theory that no one argued.

Although petitioners vigorously objected to the Arkansas Supreme Court majority's decision by petition for rehearing, review in this Court represents the only meaningful opportunity to seek relief from the decision in question. Under these unusual circumstances petitioners believe that this Court's necessary reluctance to grant relief in cases of less than major importance should be relaxed.

3. Measured against the importance of other cases currently pending before this Court, petitioners candidly question whether their claim presents any issue of sufficient public significance to warrant plenary review. Petitioners do submit, however, that a grave injustice has occurred and that this Court can and should remedy the injustice by summary action.

The facts regarding the alleged conflict of interest are simple and not in serious dispute. The portions of the record reflecting the facts are brief; and the entire record has been transmitted to the Clerk of this Court in conjunction with the filing of this petition. The law applicable to the facts is straightforward. Under these circumstances, petitioners believe that it would be appropriate for the Court to grant the petition, summarily vacate that portion of the Arkansas Supreme Court's decision denying attorney's fees, and remand the matter to the Arkansas Supreme Court for a decision regarding the proper amount of attorney's fees.

Although petitioners obviously would prefer summary reinstatement of the original $316,190 attorney's fee award, the respondent City of Little Rock raised arguments regarding the propriety of the amount of the award which were not reached by the Arkansas Supreme Court. Moreover, because the Arkansas Supreme Court modified the amount of refund awarded to the taxpayer petitioners, a proportional reduction in the original attorney's fee award would be appropriate.

As an alternative to summary action without briefing, petitioners submit that it would be appropriate for the Court to enter an order in this case requiring the parties to show cause why the Arkansas Supreme Court's decision regarding the attorney's fee issue should not be vacated without oral argument. Such a procedure has been suggested as a means for assuring that cases that are otherwise appropriate for summary action are adequately briefed on the merits of the questions presented. R. Stern & E. Gressman, *Supreme Court Practice*, 365-366 (5th ed. 1978).

CONCLUSION

Petitioner David Henry expended substantial time and energy in the successful prosecution of the taxpayer petitioners' claim. All of the petitioners, and particularly petitioner Henry, justifiably expected that those efforts would be compensated by allocation of part of the refund as payment of attorney's fees. The decision of the Arkansas Supreme Court vacated the fee award, which was a remedy no party had requested, on grounds of an alleged conflict that no party had briefed or argued before it. The decision deprives petitioner Henry of a substantial property right or expectation without the minimal fairness required by due process. Furthermore, the Arkansas Supreme Court's conclusion that petitioner Henry had a disqualifying conflict of interest stigmatizes petitioner Henry by suggesting that he engaged in improper or unethical conduct. Such serious implications should not be allowed to pass without at least some opportunity to respond on the merits of the supposed misconduct.

For these reasons petitioners request this Court to grant this petition for certiorari, summarily vacate the judgment of the Arkansas Supreme Court insofar as it denied attorney's fees, and remand the case for a determination of an appropriate attorney's fee award without regard to the alleged conflicts. As an alternative to summary action on the certiorari papers, petitioners suggest that the Court might wish to order the parties to show cause why summary action should not be taken.

In the event the Court does not view this case as one appropriate for summary action, petitioners request that

the Court grant their petition and set the case for full briefing and oral argument.

Respectfully submitted,

ALLAN GATES
MITCHELL, WILLIAMS, SELIG,
JACKSON & TUCKER
1000 Savers Federal Building
Little Rock, Arkansas 72201
(501) 376-3151

Attorneys for Petitioners

APPENDIX A

SUPREME COURT OF ARKANSAS

City of Little Rock

V.

Ann Cash, T. Smith, C.S. Robinson, Wilson Webber, Charles Watson and G. Johnson

No. 82-143

Opinion Delivered Jan 17, 1983
Appeal From The Chancery
Pulaski County, Arkansas
The Honorable Lee Munson,
Chancellor

R. Jack Magruder, III, City Atty., and Wright, Lindsey & Jennings by Patrick J. Goss, Little Rock, for appellant and cross-appellee.

David Henry, Henry & Duckett, Little Rock, for appellees and cross-appellants.

DUDLEY, Justice.

This interesting case presents many questions about illegal exactions and an attorney's conflict of interests.

Ark. Stat. Ann. §19-4201 through 19-4218 (Repl. 1980) authorized cities to purchase or construct waterworks systems. In 1937 Ark. Stat. Ann. §19-4219 (Repl. 1980) was enacted which authorized first and second class cities to create commissions to operate and manage their waterworks systems. That same year the City of Little Rock by ordinance created the Little Rock Waterworks Commission which operates and manages the system. The Board of Directors of the City, pursuant to §19-4208, retained the authority to sell and encumber the property as well as to set rates. The same statute, §19-4208, provides that the operating authority can pay surplus funds over to

the city only after taking into account the cost of operations and maintenance, allowing for replacement costs and depreciation, providing for interest redemption and purchasing all outstanding bonds.

In 1965, the General Assembly, by Act 50, gave to the operating authority of any waterworks system the discretion to make voluntary contributions to the general fund of the municipality in lieu of taxes in return for police, fire and health protection. Ark. Stat. Ann. §§19-4273 through 19-4276 (Repl. 1980). The municipality cannot force payments to be made to it pursuant to this statute as the payments in lieu of taxes are discretionary with the operating authority.

In October, 1969, the City of Little Rock, by ordinance, levied a privilege tax on the waterworks commission. The tax was in the amount of $10,417 for the period of December 1, 1969 through December 31, 1969, and $125,000 for the year 1970. The ordinance contains the following provisions:

> SECTION 3. The taxes hereby levied shall be paid in addition to any sums paid by the Little Rock Municipal Water Works under the provisions of Act 50 of 1965.
>
> SECTION 4. The Little Rock Municipal Water Works is hereby authorized to pass on said taxes by levying an additional charge of twenty-five (25¢) a month per meter upon resident consumers. The Water Works may terminate the services of any consumer who fails to pay such charge when due.

An identical ordinance was passed for the years 1971, 1972 and 1973. Beginning in 1973, the ordinances authorized the waterworks to levy a charge in the amount necessary to collect the amount of the tax, which was $167,652 in 1974; $144,000 in 1975; $145,000 in 1976; $146,500 in 1977; $148,500 in 1978; $156,822 in 1979; $322,500 in 1980; $339,066 in 1981 and $340,000 in 1982. The taxes have been paid to the city on a monthly basis at the rate of 1/12th of the yearly levy.

On August 25, 1981, six residents of the city who were water users filed suit in the chancery court against the City of Little Rock alleging that the privilege tax was an illegal exaction prohibited by Article 16, §13 of the Arkansas Constitution. The six taxpayers were represented by David Henry, a former assistant city attorney, who, at the time he filed this suit against the city, also was defending the city in another case for a fee. The city filed a motion asking that David Henry be disqualified because of his conflict of interests. The trial court refused to disqualify the attorney, found an illegal exaction, gave judgment against the city in the amount of $1,264,761.30 through March, 1982, plus interest at the rate of ten percent per annum until paid, and awarded David Henry an attorney's fee in the amount of $316,190.00. We affirm the holding that the privilege tax is an illegal exaction, modify the amount of the judgment and disallow the attorney's fee.

[1] *The illegal exaction.* Municipalities have only those powers that have been delegated to them by statues or by the Constitution, and any substantial doubt about the existence of a power in a municipal corporation must be resolved against it. *Town of Dyess v. Williams*, 247 Ark. 155, 444 S.W.2d 701 (1969), citing *City of Little Rock v. Raines*, 241 Ark. 1071, 411 S.W.2d 486 (1967) and *Yancey v. City of Searcy*, 213 Ark. 673, 212 S.W.2d 546 (1948). A city tax which is not authorized by a delegated power of taxation is an illegal exaction. *Schuman v. Ouachita County*, 218 Ark. 46, 234 S.W.2d 42 (1950), citing *Waters Pierce Oil Co. v. Little Rock*, 39 Ark. 412 (1882).

Appellant city tacitly concedes that there is no constitutional or statutory authority delegating to it the authority to levy this privilege tax. However, it argues that although its ordinance labeled the assessment a privilege tax, it is not really a tax. It contends that the terms franchise fee, franchise tax, rate, assessments, charges, privilege tax and privilege fee are interchangeable, and the use of one term instead of another does not necessarily

invalidate a legislative enactment. *See Eaton v. McCuen*, 273 Ark. 154, 617 S.W.2d 341 (1981); *Holman v. City of Dierks*, 217 Ark. 677, 233 S.W.2d 392 (1950). The city then inductively reasons that the assessment or charge or rate imposed by the ordinances should be treated as a part of the rate for water validly set by the municipality pursuant to §19-4208.

[2] The appellant's argument fails for a number of reasons. First, the assessment obviously is not a charge for services rendered to the waterworks. Those services are paid for in lieu of taxes pursuant to statutes, §§19-4274 and 19-4275, and are discretionary with the operating authority. Conversely, the tax before us is mandatory, in a set amount, and the ordinances provide that "the taxes hereby levied shall be paid in addition to any sums paid by the Little Rock Municipal Waterworks under the provisions of Act 50 of 1965." Second, all other payments by the waterworks to the municipality which come from water rates must come from surplus accumulated in the operation fund only after taking into account the cost of operations and maintenance, allowing for replacement costs and depreciation, providing for interest redemption and the purchasing of all outstanding bonds. §19-4208. Here the tax, originally at 25 cents per meter, was levied on the waterworks and passed on to the customer and then paid by the customer and passed directly back to the city without regard to the cost of operations, maintenance, depreciation and debt as set out above. Thus, it was not a part of the water rate. Third, the assessment was designated a privilege tax by the ordinances. It was clearly a tax, an unauthorized tax, and therefore an illegal exaction. We affirm the chancellor in so holding.

Contrary to appellant's argument, Section 9 of Act 23 of the 1981 Extraordinary Session of the General Assembly does not authorize the imposition of the privilege tax challenged in this case. We affirm the chancellor's granting of injunctive relief.

The amount of the illegal exaction to be recovered. The appellees argue, on cross-appeal, that no statute of limitations should have been applied and that they should be allowed to recover all money illegally exacted, over $2,000.00. The appellant contends the following in the alternative: that no refund is due, that the three year statute of limitations applies, or that the five year limitation should be applied and the recovery should be limited accordingly.

We do not find it necessary to decide the issues concerning statutes of limitation because we have always followed the common law rule prohibiting the recovery of voluntarily paid taxes. *See, e.g., Searcy County v. Stephenson*, 244 Ark. 54, 424 S.W.2d 369 (1968); *Thompson Comm'r. v. Continental Southern Lines, Inc.*, 222 Ark. 108, 257 S.W.2d 375 (1953).

In *Thompson, supra*, this Court stated the general rule as follows:

> Appellee seeks to recover voluntary payments made of taxes. This can not be done. Cooley in *The Law of Taxation*, Ch. 20, §1282, gives this rule: "It is well settled that if the payment of a tax is a voluntary payment, it cannot be recovered back, except where a recovery is authorized by the provisions of a governing statute regardless of whether the payment is voluntary or compulsory" (Vol. 3 at p. 2561); and further: "Where voluntary payments are not recoverable, it is immaterial that the tax or assessment has been illegally laid, or even that the law under which it was laid was unconstitutional. The principle is an ancient one in the common law, and is of general application. Every man is supposed to know the law, and if he voluntarily makes a payment which the law would not compel him to make, he cannot afterwards assign his ignorance of the law as a reason why the State should furnish him with legal remedies to recover it back. Ignorance or

> mistake of law by one who voluntarily pays a tax illegally assessed furnishes no ground of recovery." (Vol. 3 at page 2564).

This Court, one paragraph later, noted that Arkansas had no statute on the subject and that we follow the common law rule:

> In *Brunson v. Board of Directors of Crawford County Levee dist.*, 107 Ark. 24, 153 S.W. 828, 44 L.R.A., N.S., 293, Mr. Justice Hart, speaking for the Court said: "In some of the states the right to recover illegal taxes paid under protest is given by statute. In this state, however, there is no statute regulating the matter, and if any recovery is had it must be under the rules of the common law. The common-law rule governing cases of this kind is laid down in the following cases: *Lamborn v. County Commissioners*, 97 U.S. 181, 24 L.Ed. 926; *Union Pacific R.R. Co. v. Dodge County*, 98 U.S. 541, 25 L.Ed. 196. These cases lay down the following rule: 'Where a party pays an illegal demand, with full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release (not to avoid) his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back. And the fact that the party, at the time of making the payment, files a written protest, does not make the payment involuntary.' "
>
> *Id.* at 115, 257 S.W.2d at 379.

[3] Appellees contend that the common law rule prohibiting the recovery of voluntarily paid taxes has never been applied to an illegal exaction. While no case has specifically stated that the common law rule is applicable to recoveries pursuant to Article 16, §13, the language quoted above clearly encompases an illegal exaction under the consitutional provision. In addition, several of our cases have applied the common law rule to unconstitutional and

illegal taxes rather than just to taxes illegally assessed or collected. *See, e.g., Gates v. Bank of Commerce & Trust Co.*, 185 Ark. 502, 47 S.W.2d 806 (1931). Thus, the common law rule prohibiting the recovery of voluntarily paid taxes is applicable to illegal exactions which violate Article 16, §13 of the Arkansas Constitution.

The trial judge was aware of this common law rule but held that the payments made under the challenged ordinances were not voluntary because the ordinances provided that the waterworks could discontinue the water service of any customer who failed to pay the tax. For example, the 1970 ordinance provided:

> The Little Rock Municipal Water Works is hereby authorized to pass on said taxes by levying an additional charge of twenty-five (25¢) a month per meter upon resident consumers. The Water Works may terminate the services of any consumer who fails to pay such charge when due.

The case of *Chapman & Dewey Land Co. v. Board of Directors St. Frances Levee District*, 172 Ark. 414, 288 S.W. 910 (1926) is dispositive on the voluntariness issue. A part of that opinion is as follows:

> Under these decisions, the coercion which will render a payment of taxes involuntary must consist of some actual or threatened exercise of power possessed by the party exacting or receiving payment over the person or property, from which the latter has no reasonable means of immediate relief, except by making payment.
>
> But it is insisted by counsel for the plaintiff that the taxes alleged in the complaint takes the case at bar out of the operation of the principle decided in these cases, and brings it within the

> rule announced in *Dickinson v. Housley*,, 180 Ark. 259, 197 S.W. 25. We do not think so. In that case the collector refused to accept any sum less than the full amount demanded, and had the power to have sold the lands of the taxpayer in payment of the illegal tax. This would have constituted a cloud upon the title, and it became necessary for the owner to pay the illegal demand in order to prevent the sale. No such power existed in the board in the case at bar. If the plaintiff had refused to pay the taxes, the board of directors would have been compelled to institute proceedings against the landowner in the chancery court to collect the taxes, and the plaintiff could have presented the same matters as are set up in this case to defeat the collection of the taxes. In short, it could have defended a suit to collect the taxes upon the same ground that it bases its right to recover the taxes which it voluntarily paid.

Id. at 416, 288 S.W. at 911.

[4, 5] Likewise, the City of Little Rock, the party receiving payment, had no power to have the services of any consumer terminated. That discretionary power was given to the Little Rock Municipal Waterworks and, in turn, it never adopted any policy to terminate service to a customer who refused to pay the tax. Significantly, not one person testified that he or she in fact paid the tax because of coercion. Thus, we hold that the chancellor erred in failing to apply the common law rule prohibiting the recovery of voluntarily paid taxes. The taxes were involuntarily paid only after the date this suit was filed, August 25, 1981. All taxpayers, not just the six named plaintiffs, will be deemed to have paid their taxes involuntarily from the date of the complaint because all taxpayers, not just the named plaintiffs, are the real parties in this action. *McCarroll v. Farrar*, 199 Ark. 320, 134 S.W.2d 561 (1939).

[6] The chancellor enjoined the appellant from assessing and collecting the privilege taxes before us, but then stayed the decree. As a result, the collection of these taxes has continued during the pendency of this appeal. We hold that all privilege taxes collected pursuant to the unconditional ordinances from the date of the filing of the complaint must be refunded, less reasonable costs of administration.

The attorney's conflict of interests. Appellant contends that the trial court erred in refusing to disqualify appellees' attorney. We agree, but reversal is not the proper remedy in this case.

In its motion to disqualify appellees' attorney the appellant pleaded as follows:

> Plaintiffs' Counsel, David P. Henry, has filed this cause challenging a series of ordinances enacted by the City of Little Rock in 1969 and each year thereafter.
>
> Said Counsel was employed by the City of Little Rock as an Assistant City Attorney, beginning on or about September 6, 1971, with said employment continuing until August 11, 1978. Further, said Counsel has represented the City of Little Rock since that time on other matters and remains the attorney of record for the City in the case of *Phillips v. Weeks* before Judge Eisele.

The appellant proved that appellees' attorney had adverse interests as he was representing the city at the same time he was suing the city. The pertinent testimony, taken prior to trial on the appellant's motion to have appellees' attorney disqualified, is as follows:

> Q. [Mr. Magruder, City Attorney] Do you deny that you are currently the attorney of record in the *Phillips v. Weeks* Lawsuit?

A. [Mr. Henry, Appellees' Attorney] No.

Q. Do you deny that the lawsuit is still pending, even though it's been submitted back to the Court?

A. It's not pending from the standpoint of anything to be done by the attorneys of record.

Q. That's my point. It is, nevertheless, still pending, is it not?

A. Well, I have trouble with such a narrow—

Q. (Interposing) Let me see if I can confine that a little bit more for you. Would you identify this as Defendant's Exhibit Number Two?

Q. (Witness continuing) I can respond to your question, but I can't do it with a yes or a no.

Q. Let me show you what has been identified as Defendant's Exhibit Two and purports to be a certified copy from the United States District Clerk stating that the case is pending and you are the attorney of record. Would you disagree with that?

Q. I don't know what the U.S. District Clerk knows about the case or what his certification has to do with it. In my opinion, most or ninety-nine percent of the issues in that case has been resolved, and there is one unresolved issue pertaining to the police department practice of holding people under investigation.

Q. That issue is unresolved?

A. That one issue. To me, the case of *Phillips v. Weeks* is a dead horse. Now, I wouldn't call that pending.

Mr. Magruder. Your Honor, I would offer at this point for defendant's Exhibit Two the certified copy from the U.S. District Court Clerk.

The Court. It'll go in without objection.

* * *

Q. (Mr. Magruder cont.) Let me show you what has been identified as Defendant's Exhibit Four which purports to be a series of statements or bills sent by the firm of Henry and Duckett to the City of Little Rock on the *Phillips v. Weeks*, and I ask if you recognize those.

A. I recognize them, but one doesn't have anything to do with *Phillips v. Weeks*. Two of them don't.

* * *

Mr. Magruder. To make the record clear, Your Honor, I'd like to offer Defendant's Ten, which is a copy of the Resolution by the City Board directing my office to pursue the disqualification of Mr. Henry.

Though we do not question the good faith of the attorney, both the conflict of interest and the appearance of it are too strong to ignore. The representation of conflicting or adverse interests will most often constitute professional misconduct. A lawyer is charged with a high degree of loyalty to his client. Suing and defending the same client at the same time is, at the very best, unseemly in that regard. The law holds an attorney to a high standard of professional conduct which includes the obligation to avoid even the appearance of impropriety. Code of Professional Responsibility Canon 9. Certainly, the attorney has not succeeded in avoiding such an appearance in the instant case.

Mr. Henry testified that the city attorney had assured him that the case of *Phillips v. Weeks* would never serve as the basis for a motion to disqualify. However, the City, by

formal resolution of its Board of Directors on September 1, 1981, authorized the city attorney to move for disqualification. Even though the city attorney may have assured appellees' attorney that conflicting representation would not be a basis for disqualification, it was a vain, and useless act. The Supreme Court of New Jersey aptly and adroitly addressed the issue as follows:

> Dual representation is particularly troublesome where one of the clients is a governmental body. So, an attorney may not represent both a governmental body and a private client merely because disclosure was made and they are agreeable that he represent both interests. As Mr. Justice Hall said in *Ahto v. Weaver*, 39 N.J. 418, 431, 189 A.2d 27, 34 (1963), "Where the public interest is involved, he may not represent conflicting interests even with consent of all concerned. Drinker, Legal Ethics, 120 (1953); American Bar Association, Opinions of the Committee on Professional Ethics and Grievances 89, 183 (1957)." Mr. Chief Justice Weintraub in a "Notice to the Bar," 86 N.J.L.J. 713 (1963), stated:
>
> > "Because of some matters called to its attention, the Supreme Court wishes to publicize its view of the responsibility of a member of the Bar when he is attorney for a municipality or other public agency and also represents private clients whose interests come before or are affected by it. In such circumstances the Supreme Court considers that the attorney has the affirmative ethical responsibility immediately and fully to disclose his conflict of interest, to withdraw completely from representing both the municipality or agency and the private client *with respect to such matter*, and to recommend to the municipality or agency that it retain independent counsel. Where the public interest is involved, disclosure alone is

> not sufficient since the attorney may not represent conflicting interests even with the consent of all concerned. (Emphasis added.)

Re A. and B., 44 N.J. 331, 209 A.2d 101, 102-03, 17 ALR 3d 827 (1965).

[7, 8] The trial court was clearly in error in refusing to disqualify appellees' attorney, but we do not consider reversal to be the proper remedy in this particular case. However, we cannot allow the attorney to profit from the impropriety. Accordingly, we refuse to approve an attorney's fee, although an award of attorney's fees in tax refund cases is authorized by Ark. Stat. Ann. §84-4601 (Repl. 1980).

Other issues. Appellant city asserts a number of other points and asks reversal on each of them. While we agree that the trial court committed other errors, they are not prejudicial errors and do not require reversal.

[9] The appellees contend that the trial court erred in refusing to require appellees to comply with ARCP Rule 23, the class action rule. We agree. Appellants were not seeking just the return of their property which had been illegally exacted, but instead in their complaint asked for over $2,000,000, attorney's fees and a permanent injunction against the tax. Rule 23 does not conflict with the constitutional provision: it serves as a rule of procedure in a class action case of this nature. As stated by Garner, Sloan and Haley in *Taxpayers Suits to Prevent Illegal Exactions in Arkansas*, 8 Ark. L.Rev. 129 (1954) at 135:

> Unlike certain other provisions in the Arkansas Constitution, Article XVI, Section 13 is self-executing. But even though no legislative declaration is required for its efficacy, there is authority to the effect that the legislature may regulate the procedure so long as the Constitutional

> guarantee is not abridged. Certainly it is agreed that the statute of limitations applies to actions under this provision, just as in any other litigious circumstance. But equally certainly any statute that conflicts with, or restricts the scope of, this provision is void . . . [footnotes omitted.]

The trial judge should have made the appellees comply with Rule 23, but there is no prejudice. Our common law makes the type of action a class action and requires a complete adjudication of a fully adversary case. In *McCarroll v. Farrar*, 199 Ark. 320, 134 S.W.2d 561 (1939), this Court quoted from *Rigsby v. Ruraldale Consolidated School District No. 64*, 180 Ark. 122, 20 S.W.2d 624 (1929) as follows:

> Where a citizen and taxpayer brings an action in behalf of himself and other taxpayers against a municipality every citizen is regarded as a party to the proceedings, and bound by the judgment entered therein. In such cases the people are regarded as the real parties. For example the judgment in a suit brought by taxpayers of a town against the town and a railroad company, to enjoin the issue by the town of bonds to the company, by which it is adjudged that such bonds should issue, is binding on all the other taxpayers of the town, though not parties to the suit, and the questions involved therein are res judicata in a second suit by another taxpayer to restrain the payment of interest on the bonds. In all such cases, however, the first judgment must be bona fide.

Here there was a final adjudication of a fully developed adversary case. As a matter of law this was a class action. Thus no prejudice has been suffered by appellant as a result of the ruling.

[10] The chancellor also erred in not requiring that the Attorney General be served with notice of the

proceeding and be given an opportunity to be heard as required by Ark. Stat. Ann. §34-2510. *See, e.g., Roberts, County Judge v. Watts, County Clerk*, 263 Ark. 822, 568 S.W.2d 1 (1978). Appellees argue that §34-2510 is not applicable to this case because this is not a declaratory judgment action but rather is simply a suit pursuant to a self-executing constitutional provision to recover illegally exacted money. That argument overlooks the fact that this is a class action seeking to declare thirteen past and present ordinances invalid and seeking a permanent injunction against future collections of the privilege tax. Since the statute requires service on the Attorney General but does not require him to appear or to be made a party, the requirement of service is not jurisdictional. Therefore, even though noncompliance with the notice requirement is generally reversible error, reversal is not mandated by the statute. The purpose of the notice requirement is to prevent an ordinance or statute from being declared unconstitutional in proceeding which might not be a fully adversary and complete adjudication. Frequently, the Attorney General chooses not to appear in cases of this nature. In this particular case the attorneys for the City of Little Rock prepared exhaustive briefs in both the trial and appellate courts and our own research fails to disclose any points not argued. Thus we find no prejudice to appellant as a result of this error. This holding is limited to the facts of this particular case.

[11] The appellant similarly contends that the trial court erred procedurally in not requiring that the operating authority and its commissioners be made parties pursuant to Ark. Stat. Ann. §34-2510. The ordinances levied the tax against the waterworks and technically it is a necessary party. However, the same ordinance passed on the tax to the consumer and thus the waterworks was merely a conduit for the City of Little Rock. As a result, the matter is one of form and not substance. Hence, there is no prejudice to any of the parties and we do not reverse on this point.

[12, 13] This case comes to us on appeal from chancery court. On appeal we hear equity cases de novo on the record made below and will generally attempt to resolve all issues and dispose of them. *Ferguson v. Green*, 266 Ark. 556, 587 S.W.2d 18 (1979). The appellate court may always enter such judgment as the chancery court should have entered upon the undisputed facts in the record. *Larey, Comm'r. v. Continental Southern Lines*, 243 Ark. 278, 419 S.W.2d 610 (1967). The illegal taxes are still being collected and that ought to be stopped. In addition, we are satisfied that, as a practical matter, it would be a waste of judicial resources to reverse and remand on the basis of the errors discussed above. This case has been extensively litigated and, because rectifying these procedural matters would not affect the outcome on the merits, no purpose would be served by a reversal.

[14] Appellant contends that no refund may be had because Article 16, §13 of the Arkansas Constitution provides only for injunctive relief. The constitutional provision has not been so narrowly construed. As correctly and concisely stated in 8 Ark. L. Rev. 129 at 133, *supra*:

> Injunctive relief is by far the most frequent remedy sought by complainants when suing under authority of Article XVI, Section 13; but it is not the only remedy. Suits have been brought, and allowed, to cancel a deed; to recover sums of money; to have an ordinance declared void; to set aside a default judgment; to appeal a quorum court action; to have an accounting of taxes collected but not accounted for; and so forth. Also it has been held that mandamus lies at the instance of a taxpayer to compel officers to comply with an initiated act fixing their salaries and compensation. [Footnotes omitted.]

[15] Appellant also contends that the chancellor erred in awarding post-judgment interest. We find no error. The

award of post-judgment interest was correct. Ark. Stat. Ann. §29-124 (Repl. 1979) provides that judgments shall bear interest at the rate of 10 percent per annum. In applying this statute, this Court in *Shofner, Administrator v. Jones*, 201 Ark. 540, 145 S.W.2d 350 (1940), stated:

> The legislative intent seems to have been that all judgments should bear interest except those expressly excluded; and since claims against estates when converted into judgments are not excepted, the rule *inclusio unius est exlusio alterius* applies . . . .

Since judgments against municipalities are not excluded in Ark. Stat. Ann. §29-124, the holding requires that the judgment entered bear interest until paid at the rate of 10 percent per annum.

[16] The appellant is correct in its contention that the full amount of the refund should not be awarded personally to appellees. As we stated in *Laman v. Moore*, 193 Ark. 446, 100 S.W.2d 971 (1937): "Neither the original plaintiff nor the intervenor could recover a personal judgment against any of the appellees except for the benefit of all taxpayers of the City." The appellees are appearing as representatives of a class. Accordingly, the judgment must be modified to reflect that the refund is for the benefit of all taxpayers.

Numerous other points are raised but we do not consider it necessary to decide them because of the disposition of the case.

The appellant did not designate as a point of appeal the system of refunding which was ordered by the trial court.

The case is affirmed in part, modified in part and remanded to the trial court for refund proceedings which shall be consistent with this opinion.

ADKISSON, C.J., and PURTLE, J., dissent.

HAYS, J., not participating.

PURTLE, Justice, dissenting in part; concurring in part.

The majority opinion sets out sufficient facts for a clear understanding of this case with the exception of that portion of the record relating to the relationship of the appellees' attorney and the appellant in this case. I feel the majority should have quoted that part of the record where the attorney for the appellees in the present case offered to give the *Phillips v. Weeks* file back to the city attorney because he feared it might become the subject of a motion to disqualify. Part of Mr. Henry's testimony was:

> Mr. Magruder told us he didn't want the *Phillips v. Weeks* file back and that if we would keep it, it would never serve as a basis for any motion to disqualify.

It should be pointed out that all of the ordinances which the appellant claims were enacted with the approval of attorney Henry were nothing more than the same ordinances being reenacted several times. Every year when the city decided to levy this illegal tax they upped the ante and required a larger payment by the Water Works Commission, which is a tool in the hands of the City Directors of the City of Little Rock, Arkansas. Also, it should be kept in mind that the ultimate parties responsible for the payment of this illegal tax were the customers of the City of Little Rock and other areas served by the Little Rock Water Works Commission.

The attorney for the appellant engaged in the private practice of law with the full knowledge and consent of the Board of Directors for the City of Little Rock. He later instituted a suit to force the city to refund monies they had illegally collected from the public. They contend it is unfair because he gained such knowledge while he was an assistant city attorney which now constitutes an adverse

interest. Nonsense! The ordinances are public records and are actually published in the newspapers in order that the public might become aware of them.

I have no doubt that the present attorney for the appellant feels that he has misled attorney Henry because he has been forced by the board of directors to back down on his word that the *Phillips v. Weeks* case would never be used to disqualify him.

The truth of the matter is that it is none of the board's business as to whether David Henry receives $5 or $500,000 in this case. It is not coming from the pockets of the city. The city is only responsible for the refund they have been ordered to make. Therefore, they have no standing to argue this point. The fee allowed by the chancellor is a part of the recovery made by the efforts of Mr. Henry and his associates. So far as I am concerned, attorney David Henry has acted with the utmost honesty and frankness in the entire matter. Certainly, it cannot be said of him that he backed down on his word. If those who recover the funds are satisfied with the amount of attorney's fee allowed, then it should be allowed. Certainly, the city attempted to defeat the rights of these same people from collecting anything whatsoever. Now it looks to me like a case of sour grapes.

I would reduce the attorney's fee in the same proportion that the amount of the recovery is reduced and allow him the 25% authorized by the trial court, provided his clients do not object.

ADKISSON, Chief Justice, dissenting.

I dissent from denial of the attorney fee. The sanction applied in this case far exceeds the impropriety. No consideration is given to the public service performed by this attorney in stopping the illegal exaction.

APPENDIX B

SUPREME COURT OF ARKANSAS

City of Little Rock

V.

Ann Cash, T. Smith, C.S. Robinson, Wilson Webber, Charles Watson and G. Johnson

No. 82-143

Opinion Delivered Jan 17, 1983
Appeal From The Chancery
Pulaski County, Arkansas
The Honorable Lee Munson,
Chancellor

JOHN I. PURTLE, Associate Justice

I would grant the petition for rehearing in the matter of the appellant's attorney fee. The attorney had absolutely no conflict of interest. The City of Little Rock obviously broke its word of honor. The City further persuaded a majority of this court to deny the attorney any compensation whatsoever for his work, which action by the City smacks of pure spite and retaliation. If it were the

intent of the majority to chill and discourage attorneys from undertaking class actions against a governmental unit then the opinion is eminently successful. We should right the wrong which we committed in the initial opinion. I would grant the rehearing.

APPENDIX C

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION

ANN CASH, T. SMITH, C.S. ROBINSON,
WILSON and G. JOHNSON ..... PLAINTIFFS,

vs. NO. 81-4165

CITY OF LITTLE ROCK, ARKANSAS ... DEFENDANT.

ORDER

Now on this 20th day of November, 1981, Defendant's Motion to Disqualify Counsel for Plaintiffs came on to be heard, Plaintiffs' counsel appearing in person and by and through their solicitor, John B. Plegge, and the Defendant appearing by and through the City Attorney, and the matter was submitted to the Court upon the pleadings and briefs filed herein, the testimony offered by Defendant, statements of counsel, other matter, proof and things, from all of which the Court doth find:

1. That Plaintiffs' counsel's former representation of Defendant as an Assistant City Attorney was not a true attorney-client relationship, but was that of public attorney with no attorney-client privilege as to communications involving the passage of City Ordinances as per the Arkansas Freedom of Information Act (Ark. Stat. Ann. §12-2801 et seq.) and *Laman v. McCord*, 245 Ark. 401, 432 S.W.2d 788 (1973).

2. That Plaintiffs' counsel did not receive any information, confidential or otherwise, which pertains to the issues in this action. Further, there was no information pertaining to this cause of action which should be protected or which would have benefited Plaintiffs or worked to Defendant's detriment.

3. That Plaintiffs' counsel's former representation of Defendant has no relationship to the matters involved in this litigation or his current representation of Plaintiffs in this cause.

4. That there is no relationship between the matters herein involved and those involved in Plaintiffs' counsel's representation of certain named members of the Little Rock Police Department in the U.S. District Court case of *Phillips v. Weeks et al.*; that the *Phillips* case has been under advisement since 1975 and Plaintiffs' counsel's involvement since that time has only pertained to procedural matters and Defendant has waived and should be estopped from asserting such as a basis for disqualification.

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED that Defendant's motion to Disqualify Counsel for Plaintiffs be, and the same is hereby, overruled.

This order having been made the 20th day of November, 1981, but inadvertently omitted from the record is entered this 2 day of December, 1981, nunc pro tunc.

/s/ Lee A. Munson
CHANCELLOR

APPENDIX D

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS

ANN CASH, T. SMITH, C.S.
ROBINSON, WILSON WEBBER,
CHARLES WATSON and G. JOHNSON PLAINTIFFS

VS. NO. 81-4165

CITY OF LITTLE ROCK, ARKANSAS DEFENDANTS

DECREE

Now on this 25th day of February, 1982, this cause came on for trial, Plaintiffs appearing by affidavit and stipulation and by and through their Solicitors, Henry and Duckett, and Defendant appearing by and through Lester A. McKinley, Assistant City Attorney, and the matter was submitted upon the record, the testimony elicited at trial, the exhibits and stipulations presented at trial, statements, argument and briefs of counsel, other matters proof and things from all of which the Court doth make the following findings of fact and conclusions of law:

1. The Court has jurisdiction of this cause and of the parties hereto.

2. That this cause of action is brought pursuant to Article 16, §13 of the Constitution of the State of Arkansas, challenging the validity of 13 Ordinances of Defendant which assess privilege taxes against Defendant's wholly owned municipal water works and which further authorize the amount of said taxes to be passed on and collected from water users located within Defendant's municipal boundaries.

3. That the amount of said privilege taxes exceed the maximum amounts permitted by Act 50 of 1965 to be collected by a municipality from a wholly owned municipal water works. Also, there is no constitutional or legislative authority for municipalities to charge privilege taxes against wholly owned water works systems. Consequently, the Court finds that the privilege taxes levied by the Defendant are contrary to law and void and that each such ordinance levying the subject taxes constitutes an illegal exaction.

4. That the illegal ordinances are set out below by number and date of passage, as follows:

ORDINANCE NO.	DATE
12,284	12-22-69
12,409	11-18-70
12,574	12-1-71
12,721	12-19-72
12,882	12-18-73
12,998	12-30-74
13,121	12-16-75
13,222	12-7-76
13,383	12-1-77
13,571	12-19-78
13,752	11-20-79
13,918	11-18-80
14,150	11-3-81

5. That Article 16, §13 of the Constitution of Arkansas is a self-executing constitutional provision and entitles Plaintiffs to the relief requested. Further, since such relief is not based upon any implied contract or other breach of fiduciary responsibility, the three year statute of limitation is inapplicable. Further, the General Assembly has not enacted any specific statute of limitations applicable to suits for the recovery of illegal exactions and, therefore, the general five year statute of limitations, Ark. Stat. Ann.

§37-213 which pertains to all actions not otherwise the subject of a statute of limitation shall apply.

6. The Common Law Rule regarding the recovery of voluntarily paid taxes does not apply to rights created under Article 16, §13 and that such would be an abridgement of the constitutional right therein created. Also, the Court specifically finds that the payments made under the hereinabove described ordinances were not voluntary, but were made under the terms of each of the ordinances which provide that the Little Rock Municipal Water Works can discontinue the water service of any water consumer who fails to pay the subject tax.

7. Defendant's request for set-off should be denied with the exception of those amounts of privilege taxes Defendant has paid on its own water meters. In this regard the Defendant shall be allowed to submit a supplement to Defendant's Exhibit 2 showing the amount of said privilege taxes for the five year period next preceeding the filing of this action on August 24, 1981.

8. Plaintiffs should proceed forthwith to prepare a refund plan to be presented before the Court on March 15, 1982 at 1:30 p.m. Also, commensurate with the presentation of the refund plan, the Court will entertain Plaintiffs' attorneys' application for attorneys' fees and cost of preparation of suit to be paid from the recovery hereinafter set forth.

9. The amounts of the recovery, as well as the set-off for privilege taxes paid by Defendant, as hereinafter set forth are based on the stipulated exhibits presented to the Court during trial. Any discrepancies in said amounts shall be presented by the parties at the aforesaid hearing for presentation of a refund plan and hearing for award of attorneys' fees and costs. The attorneys for the parties should proceed immediately and diligently to finally resolve any discrepancy and/or confirm the accuracy of the stipulated trial exhibits regarding these amounts.

IT IS, THEREFORE, BY THE COURT, CONSIDERED, ORDERED, ADJUDGED AND DECREED that Defendant be and is hereby enjoined from assessment and collection of privilege taxes from the Little Rock Municipal Water Works. Further, since Defendant is in the process of collecting the March payment of such taxes, the March payment is included in the Judgment given herein and this injunction shall not apply to said March payment.

IT IS FURTHER ORDERED AND DECREED that Plaintiffs have Judgment of and from Defendant in the total amount of $1,264,761.33, representing privilege taxes collected from August 1976 (five years prior to the filing of this cause of action on August 24, 1981, inclusive,) through March 1982. Said Judgment shall be as if at law for which garnishment and execution shall issue with legal interest thereon from the date hereof until paid.

The Court doth retain jurisdiction of this cause to protect and enforce the rights of the parties as hereinabove set forth.

Dated this 8th day of March, 1982.

/s/ Lee A. Munson
CHANCELLOR

EXHIBIT E

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION

ANN CASH, T. SMITH, C.S. ROBINSON, WILSON WEBBER, CHARLES WATSON and G. JOHNSON — PLAINTIFFS

VS. — NO. 81-4165

CITY OF LITTLE ROCK, ARKANSAS — DEFENDANT

ORDER

Now on this day this cause comes on to be heard upon this Court's Decree, entered herein on March 8, 1982, directing the submission of a refund plan and upon Plaintiffs' attorneys application for an award of attorneys' fees and cost of suit, the Plaintiffs appearing by and through their Solicitors, Henry and Duckett, and the Defendant appearing by and through R. Jack Mugruder, III, Little Rock City Attorney and Lester A. McKinley, Assistant City Attorney, and the matters were submitted to the Court upon the record herein, the testimony of the witnesses, taken ore tenus, statements of counsel, other matters, proof and things, from all of which the Court doth find:

1. Plaintiffs have submitted a refund plan which is filed for record herein and which the Court finds fair and equitable, and which the Court should approve subject to certain additions, as follows:

a) Prior to distribution of the refund as described in the refund plan filed herein as Plaintiffs' Exhibit 7, Plaintiffs will cause to be

published in a newspaper of general circulation in the central Arkansas area, once a week for four consecutive weeks, a notice which advises that any Little Rock Municipal Water Works consumer who paid privilege taxes on their water bill from August 1976 to January 1, 1979, or who has discontinued service with the Little Rock Municipal Water Works prior to the date of determination of current active accounts, may make claim for the taxes paid less a prorata deduction for expenses, attorneys' fees and costs of refund.

b) Said notice shall also note that any such interested person shall have 60 days from the date of first publication to file such individual claims or be barred from further refund except as to that each might receive in accordance with the refund plan, (Plaintiffs' Exhibit 7), if any.

c) Plaintiffs will provide the name, address and telephone number of the person designated to receive such claims during the aforesaid 60 day period. Further, Plaintiffs will administer such claims and will be entitled to reimbursement up to $700.00 per month or a total of $1400.00 as an administrative expense to provide the necessary clerical assistance to receive such claims.

d) All claims received and verified during such 60 day period will be entitled to a specific refund as hereinabove provided.

e) Should this cause be appealed, the date determination of those active accounts which are entitled to refund at the close of the 60 day period will be advanced accordingly.

f) The net refund available at the close of the 60 day period will be distributed as per Plaintiffs' refund plan (Plaintiffs' Exhibit 7).

2. The Court will retain jurisdiction of the refund plan and resulting distribution to protect the rights of the ratepayers, Plaintiffs, Plaintiffs' attorneys and the Little Rock Municipal Water Works, should the need arise for further direction in this regard.

3. Plaintiffs' attorneys have applied for an award of attorneys' fees and cost of suit as per Ark. Stat. Ann. §84-4601 and the Court being well and sufficiently advised finds as follows:

a) That Ark. Stat. Ann. §84-4601 is applicable, but not to the extent of expressly authorizing a contingency fee award.

b) However, Ark. Stat. Ann. §84-4601 does declare the public policy of this state and can only be interpreted as providing a basis upon which taxpayers in suits of this nature can avail themselves of competent, knowledgable attorneys, who must risk not being paid at all. The contrary would require a few to contract on an hourly basis for the payment of attorneys' fees, whether such actions were successful or not.

c) Under the circumstances of this case, and the Court's personal knowledge of the issues raised and the efforts involved, Plaintiffs' attorneys should be awarded a fee of 25% of the recovery, including 10% interest until paid and an additional sum of $2,933.00, for cost expended thus far.

IT IS THEREFORE, CONSIDERED, ORDERED AND ADJUDGED that the refund plan submitted by Plaintiffs (Plaintiff Exhibit 7), as hereinabove modified, be and the same is hereby approved and made the Order of this Court.

IT IS FURTHER ORDERED that Plaintiffs' attorneys be and they are hereby awarded attorneys' fees in an

amount equal to 25% of Plaintiffs' recovery, with interest at the rate of 10% per annum until paid; said sum to be paid from the recovery so received.

IT IS FURTHER ORDERED that Plaintiffs be and they are hereby awarded the sum of $2,933.00 from the recovery for costs expended.

/s/ Lee A. Munson
CHANCELLOR

March 24, 1982
DATE